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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Implementation of the Telecommunications Act of
1996:

Telecommunications Carriers' Use of Customer
Proprietary Network Information and Other Customer
Information

CC Docket No. 96-115

**PETITION FOR RECONSIDERATION AND
CLARIFICATION OR FORBEARANCE**

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Pursuant to Section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") rules, 360° Communications Company ("360")¹ submits the following Petition for Forbearance or Reconsideration and Clarification of the Commission's *Second Report and Order* in the above-captioned proceeding.² The *Second Report and Order* adopts rules interpreting Section 222 of the Communications Act of 1934, as amended (the "Act"). Section 222 restricts the ability of certain telecommunications carriers to use customer proprietary network information ("CPNI") to market new services.

¹ 360° operates cellular systems in more than 100 MSAs and RSAs in 15 states, providing cellular service to approximately 2.6 million customers. 360° also provides one-way paging services on a facilities and resold basis, resells long distance services, and offers Cellular Digital Packet Data Service ("CDPD").

² See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, FCC No. 98-27 (Feb. 26, 1998) ("*Second Report and Order*").

I. Introduction and Summary

360° asks the Commission to forbear from applying the Section 222 CPNI obligations to CMRS providers or, in the alternative, seeks reconsideration and clarification of these rules as they apply to commercial mobile radio services (“CMRS”) carriers. Specifically, 360° seeks Commission forbearance from application of the CPNI requirements of Section 222 of the Act to CMRS providers. In the alternative, 360° asks the Commission to reconsider (1) the Commission’s application of the “total service approach” to CMRS and requests that it strike the reference to CMRS in new rule section 64.2005(b)(1) and add a new subsection that provides for a more expanded definition of CMRS service that, at a minimum, includes CMRS voice, paging, customer premises equipment (“CPE”), CPE maintenance and insurance services, wireless data, and call management services such as voice mail, and (2) the restriction on “win-back” and certain approaches to customer retention marketing. In addition, 360° asks the Commission to clarify that the requirement that carriers implement a CPNI status flag on the first computer screen in a customer’s database account does not require a carrier to place that flag on *every* account screen for each customer in systems where the database operator may start at any number of “first screens.”

The Commission provides no justification for its application of the “total service approach” in the CMRS context and, indeed, there is none. CMRS encompasses a broad range of services and products, including CPE and information services, that are an integral part of customers’ total CMRS service. The Commission’s new CPNI rules, however, separate CPE, “basic” service, and information services, and require customer approval

before such services may be marketed in an integrated fashion. These rules will burden unnecessarily CMRS providers and significantly harm their ability to offer consumers high-quality, advanced services. Moreover, these rules will undermine legitimate consumer expectations regarding the nature and scope of the CMRS services.

II. The Commission Should Forbear, Under Section 10 of the Act, From Imposing CPNI Obligations On CMRS Providers

Section 222(c)(1) of the Act provides protection for consumers' proprietary network information while permitting reasonable pro-competitive use of such information.³ The Commission interpreted this provision very narrowly in what it describes as the "total service approach,"⁴ and did not consider that CMRS providers must combine many different products and services to meet the special telecommunications needs of mobile customers. Such service integration is necessary to enable CMRS providers to offer a total service

³ *Id.* at ¶3. The subsection addressed in the *Second Report and Order*, Subsection 222(c)(1), provides:

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C. § 222(c)(1).

⁴ See *Second Report and Order* at ¶30.

solution.⁵ The total service approach, however, only permits “carriers to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer’s existing service relationship with their carrier.”⁶ In view of the integrated nature of CMRS, the Commission has acted arbitrarily in applying the total service approach to CMRS services in exactly the same manner it has applied this approach to all other telecommunications services.⁷

Section 10 of the Act requires the Commission to forbear from applying any regulation or any provision of the Act to a “class of telecommunications carriers or telecommunications services” if the Commission determines that: (1) enforcement is not necessary to ensure that charges, practices, classifications, or regulations are just and

⁵ Although this petition does not address the impact of the new CPNI rules on wireline telecommunications services, 360° is aware that this trend to integrate services and products, although a part of CMRS service provision from its inception, also exists in other segments of the telecommunications industry.

⁶ *Id.* at ¶4.

⁷ New rule Section 64.2005(b)(1) states:

A telecommunications carrier may not use, disclose, or permit access to CPNI derived from its provision of local service, interexchange service, or CMRS, without customer approval, for the provision of CPE and information services, including call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services.

Second Report and Order at App. B, 47 C.F.R. §64.2005(b)(1).

reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁸

As is discussed in detail below, the highly competitive nature of the CMRS industry, coupled with the unique telecommunications needs o

mobile customers, has forced CMRS providers to develop highly integrated service offerings in order to compete. Customers have come to rely upon these integrated offerings to provide them with advanced call management tools and to help them to more efficiently and cost effectively utilize CMRS services. Customers have also come to expect that carriers will inform them of service features, options, and products and to use CPNI to market to them the most effective and efficient service combinations. The new CPNI rules, however, will prevent CMRS providers from providing these highly beneficial marketing services, frustrating the legitimate expectations and desires of customers.

Because the CMRS marketplace is highly competitive, with no one carrier exercising market power, CMRS carriers are constrained by market forces from charging unjust or unreasonable prices or engaging in unreasonable practices. To the extent that customers may disapprove of a carrier's use of CPNI to market CMRS services, those customers will change carriers. Thus, if a carrier is to maintain its customer base, it must not abuse or improperly use CPNI. The new CPNI rules, therefore, are unnecessary to prevent unreasonable or unjust carrier behavior.

Moreover, not only are the new CPNI rules unnecessary to regulate CMRS provider marketing, they are not necessary to protect the privacy interests of CMRS customers.

⁸ 47 U.S.C. § 160(a).

Rather, the new rules will merely limit customer choice and prevent them from making the most effective utilization of their CMRS service by denying them access to the information necessary to make informed service choices. Where, as in the CMRS marketplace, customers expect use to be made of their CPNI to permit beneficial marketing practices, suddenly changing these practices will cause significant consumer confusion and harm.

Finally, the public interest will be served by ensuring the continuation of legitimate, beneficial marketing practices that have both helped consumers manage their CMRS service costs and have spurred competition by enabling carriers to differentiate themselves in the marketplace by offering new and enhanced service bundles. In making the public interest assessment under Section 10, the Commission must consider whether "forbearance will enhance competition among providers of telecommunications services."⁹ If the Commission determines that forbearance will promote competition, that determination may be the basis for a Commission finding that forbearance is in the public interest.

Therefore, Commission forbearance from enforcing the CPNI rules against CMRS carriers will permit many beneficial and pro-competitive marketing practices to continue. The result will be more advanced service offerings and lower prices for consumers. Thus, the public interest will be served by a grant of forbearance for CMRS providers.

III. The Commission's Application of the "Total Service Approach" to CMRS is Arbitrary and Capricious

Mobile customers have different telecommunications needs depending upon their individual circumstances at any given time. A customer may, for example, while in a meeting

⁹ 47 U.S.C. § 160(b).

or while driving, choose not to answer incoming calls, preferring to let them be answered by voice mail. At other times, the same customer might prefer message paging services rather than voice services. At still other times, that customer might require access to wireless data services. CMRS providers must respond to such varying needs by offering services that adapt to the changing requirements of the mobile user. CMRS providers have met this challenge by developing integrated service offerings that include a combination of voice, paging, information and call management services, as well as various CPE products.

The integrated nature of products and services in the CMRS industry requires that CMRS services and products be marketed and available as both integrated service packages or individual service add-ons. The Commission's total service approach, however, artificially separates the integrated CMRS services and products into distinct categories, including CPE, information and data services, and basic CMRS service, and restricts the manner in which the categories may be marketed, absent prior customer approval. This restrictive rule is unnecessary and frustrates consumer expectations

Bundled service packages that include CMRS service and CPE, as well as information services and various service features, such as voice mail, that enhance a customer's call management capabilities, represent the majority of today's CMRS offerings. Customers have come to expect CMRS carriers to make available these and even more highly integrated service packages as improved technology enhances the possible uses for CMRS spectrum. More important, customers expect to be made aware of the availability of these new packages and how new service offerings may allow them to make more efficient

use of their CMRS service.¹⁰ The new CPNI rules will frustrate such customer expectations and require 360° immediately to cease original planned marketing efforts for 90% of the new custom calling feature packages planned to be rolled out to existing customers this year in its Mid-Atlantic and Southeast service regions alone.¹¹

Section 222 does not compel the highly restrictive approach adopted by the Commission. A more reasonable application of Section 222 to CMRS would permit the use of CPNI where customers have an expectation that such information would be used and prohibit such uses only in those instances where customers clearly would not expect that information to be used in the manner contemplated. CMRS customers expect their CPNI to be used to inform them as to the best and most efficient uses of new and previously available CMRS service components. Neither the text of Section 222 nor the legislative history suggests that the new CPNI provisions of the Act were meant to deprive CMRS customers of their legitimate expectations. Nor do they support the complete restructuring of the CMRS marketplace or the excessive burden on competition of limiting beneficial marketing and service practices.

¹⁰ It has been 360°'s experience that customers desire product services and packages that enable them to make the most cost effective use of their CMRS services. These customers assume that their carrier will suggest the most cost effective packages or combinations of services and products.

¹¹ Although, under the new rules, CMRS providers may seek prior customer approval to market integrated services, it is 360°'s understanding that customer education efforts take months to implement and even longer to begin to receive customer responses. Moreover, research on such efforts in other industry segments indicates that response to requests for approval are not likely to be high, regardless of customer desire for integrated marketing. See *Second Report and Order* at ¶ 99 (discussing US West CPNI approval test marketing results).

In the highly competitive CMRS industry, integrated service offerings are an essential tool used by consumers to distinguish among competing carriers. Consumers have come to associate CMRS with a wide variety of products and services, many of which are interchangeable. A customer's "total service" must include these additional products and services in order to meet basic customer expectations. Thus, if the Commission declines to forbear from applying the CPNI requirements of Section 222 to CMRS services as we urge in Part I, it should modify its total service approach to protect consumer expectations of the scope of their service relationship with CMRS carriers. Specifically, the Commission should strike the reference to CMRS in new rule section 64.2005(b)(1) and add a new subsection that provides for a more expanded definition of CMRS service that, at a minimum, includes CMRS voice, paging, CPE, CPE maintenance and insurance services, wireless data, and call management services such as voice mail.¹²

¹² Although the Commission noted in a recent clarification of its CPNI rules that CMRS carriers may utilize information obtained from the sale of CPE and information services to customers to market other such products and services, *see Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, DA No. 98-971, at ¶4 (May 21, 1998) ("*Clarification Order*"), a carrier would not be permitted to market such products and services to customers who had not purchased CPE or information services from that carrier or its agent. *Id.* at ¶6. For example, 360° would not be permitted under this interpretation to market CPE to a customer who switched from another carrier and reprogrammed his CPE for the 360° network. The clarification fails, therefore, to eliminate the unnecessary burden on competition and harm to consumer expectations caused by the new CPNI rules.

IV. The "Win-Back" Restriction Burdens Competition For Telecommunications Services With No Countervailing Benefit For Consumer Expectations Of Privacy

The new CPNI rules' flat prohibition in Section 64.2005(b)(3) against the use of CPNI for customer retention and "win-back" will unnecessarily hamper a well-established competitive practice that substantially benefits consumers. In addition to the highly integrated nature of CMRS services and products, the CMRS industry is marked by a high level of customer "churn," or turnover, which can reach as high as 30 percent annually.¹³ A high churn rate ultimately benefits the consumer by forcing carriers to drop prices and offer more attractive service packages in an effort to retain customers. As a result, it has been 360°'s experience that customers not only have come to expect their service provider to use their CPNI for retention calls, they have come to rely on such calls to negotiate more competitive service arrangements.

The Commission stated in the *Second Report and Order* that it was "persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship."¹⁴ The win-back restriction, however, prevents carriers from utilizing one of the more effective methods for marketing service improvements and enhancements. If a customer switches

¹³ Request for Deferral and Clarification of the Cellular Telecommunications Industry Association, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, at 22-23 (April 24, 1998). 360° recognizes that other telecommunications services, such as long distance service, are also marked by a high level of customer churn. This discussion should be considered for these services as well.

¹⁴ *Second Report and Order* at ¶ 24.

providers, the original carrier must improve its offer to maintain the customer. Counter-offers can be in the form of reduced rates, additional free minutes of use, and additional products or services added to the customer's service package, to name only a few. These offers constitute enhancements to the customer's existing service relationship and, therefore, are within the "parameters of the customer-carrier relationship." Thus, contrary to the Commission's unsupported claim that the use of CPNI to retain a customer "is outside of the customer's existing service relationship,"¹⁵ win-back and retention calls should fall within the category of marketing calls that do not require prior customer approval. To hold otherwise will deprive the consumer of the benefits of competition.

As with integrated service offerings, Section 222 of the Act does not require the level of restriction adopted by the Commission. Indeed, the Act itself does not address win-back. To the extent that customers expect their CPNI to be used for win-back marketing, there is no harm to consumers' privacy rights. The win-back restriction does not balance properly consumer rights and competitive concerns, and, fails to properly implement congressional goals and policy. The Commission must reconsider this rule for all telecommunications carriers.¹⁶

¹⁵ *Second Report and Order* at ¶ 85.

¹⁶ Although a provider may contact all of its former customers for marketing purposes, *see Clarification Order* at ¶9, it may not use CPNI to contact a subset of its former customers. This restriction on contacting the subset of former customers most likely to benefit from targeted, integrated CMRS offers restricts competition and harms the consumer. 360° submits that there should be no win-back marketing restrictions for CMRS carriers.

V. The Commission Should Clarify That Customer CPNI Use Approval/Disapproval “Flags” Need Not Appear On Every Screen In A Carrier’s Customer Database

Although 360° generally supports the safeguard rules adopted to ensure carrier compliance with Section 222, one implementing rule, if not clarified, would unnecessarily burden CMRS and potentially other carriers. Specifically, new rule section 64.2009(a) provides that “[t]elecommunications carriers must develop and implement software that indicates within the first few lines of the first screen of a customer’s service record the CPNI approval status and reference the customer’s existing service subscription.”¹⁷

In many cases, carriers’ customer databases are designed to allow operators to enter consumers’ records at any number of computer screens. For these carriers, a literal reading of the new rule would require that a CPNI flag and associated information be placed on *every* computer screen within a customer’s records. The expense required to comply with such a broad requirement would be severely burdensome and completely unnecessary. The Commission should clarify, therefore, that carriers may develop a single CPNI status screen for each customer and train its operators to check that screen prior to any use of CPNI for marketing purposes. This approach addresses the underlying compliance concern without requiring a massive rewriting of customer database systems. Because any implementation costs to comply with the Commission’s new CPNI rules ultimately must be passed along to consumers, this clarification will also serve the public interest by reducing unnecessary compliance costs.

¹⁷ *Second Report and Order* at App. B, 47 C.F.R. §64.2009.

VI. Conclusion

The Commission's new CPNI rules fail to take into account the realities of the CMRS marketplace and the integrated, dynamic nature of the CMRS carrier-customer relationship. Because the CPNI requirements of Section 222 of the Act are not necessary to protect consumers and will hinder competition in the CMRS industry, the Commission should forbear from enforcing these requirements on CMRS providers. In the alternative, the Commission must reconsider and clarify its rules as discussed above to ensure that, in the application of these rules to CMRS carriers, the Commission does not needlessly frustrate legitimate customer expectations regarding the scope and nature of CMRS available to them.

Respectfully submitted,

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May 26, 1998

CERTIFICATE OF SERVICE

I, Kathryn M. Stasko, do hereby certify that the foregoing **PETITION FOR RECONSIDERATION AND CLARIFICATION OR FORBEARANCE** was delivered, via hand delivery, on this 26th day of May, 1998, to the following:

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